

# EXHIBIT 8

**In The Matter Of:**

***MICROSOFT CORPORATION***

***v.***

***MOTOROLA INC., et al.***

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***MAXIMILIAN HAEDICKE - Vol. 1***

***June 14, 2013***

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**MERRILL CORPORATION**

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1 you expect that they would enter into a license and 09:21:50  
2 dismiss the case? 09:21:52

3 A Depends if they also agree on the other issues 09:21:53  
4 which are involved in License Agreement. The license 09:21:57  
5 fee is one of the important aspects, but there are other 09:22:01  
6 aspects which also have to be covered, and they will 09:22:07  
7 only have a full-fledged and valid contract if they 09:22:10  
8 agreed on all essential elements of the contract, and 09:22:13  
9 only then will they dismiss the case, or would they 09:22:16  
10 make -- would they render the case moot. 09:22:20

11 Q Let's suppose that the parties do not agree on 09:22:22  
12 a license fee. 09:22:25

13 Does the Orange Book decision say that the 09:22:26  
14 defendant must use the second alternative option of 09:22:30  
15 letting the patent holder set the royalty? 09:22:34

16 A Please repeat the question. 09:22:35

17 Q If the parties do not agree on a license fee -- 09:22:37

18 A Yes. 09:22:40

19 Q -- does the Orange Book decision say that the 09:22:40  
20 defendant must use the second option of allowing the 09:22:43  
21 patent holder to set the royalty? 09:22:47

22 A They have the option. They do not -- they 09:22:48  
23 must -- they have the option to do it. 09:22:53

24 Q Let's talk about a proceeding in which the 09:22:55  
25 court -- a court exams the royalty that has been set by 09:22:58

1 a patent holder through the alternative procedure. 09:23:03

2 What evidence is considered in a proceeding 09:23:05

3 like that? 09:23:07

4 MS. BERRY: Objection -- 09:23:09

5 THE WITNESS: This is -- 09:23:09

6 MS. BERRY: -- lack of foundation. 09:23:11

7 THE WITNESS: -- this is speculative because 09:23:11

8 I'm not aware of any rate setting procedures which have 09:23:16

9 been brought to my attention. I have not taken part in 09:23:19

10 any of those, so, of course, I cannot know the details, 09:23:23

11 and I can only speculate, but my speculation would be 09:23:26

12 that the parties will determine the rate according to 09:23:30

13 the -- the standards which are used also when it comes 09:23:35

14 to the determination of license fees; for example, when 09:23:39

15 it's about damages or in cases like this. So I would 09:23:42

16 assume that similar standards would be applied. 09:23:46

17 BY MR. LOVE: 09:23:50

18 Q And I think we discussed this earlier, so 09:23:52

19 correct me if I'm wrong, but the standard used to 09:23:54

20 evaluate the rate in that proceeding would be whether 09:23:56

21 the rate was within the limits set by antitrust law; is 09:23:59

22 that correct? 09:24:03

23 A Yes. 09:24:03

24 Q What happens if the rate set by the patent 09:24:03

25 holder does not meet that standard? 09:24:08

1	A	In 315 procedure?	09:24:09
2	Q	Yes.	09:24:14
3	A	What happens if --	09:24:14
4	Q	What happens if the court determines that the	09:24:16
5		rate set by the patent holder is not within the limits	09:24:19
6		of antitrust law; what will the court do?	09:24:22
7	A	Then a -- a lower rate will be set, which is	09:24:25
8		still in the limits. The court will control the offer	09:24:30
9		which has been given by the patent holder, if there is	09:24:36
10		such an offer, and will determine whether this is within	09:24:42
11		the boundaries of antitrust law, and if not, the rate	09:24:45
12		will be set according to antitrust law and the other	09:24:49
13		important laws which come into play.	09:24:55
14	Q	Does the license seeker have to pay the rate	09:24:58
15		that was set by the patent holder until the court rules?	09:25:01
16	A	Payment means transfer of funds to the -- to	09:25:03
17		the licensor? No. He has to escrow money, as much --	09:25:10
18		as much money as he deems appropriate. If he wants to	09:25:15
19		be on the absolutely safe side, he may depose estimate	09:25:21
20		escrow as much money as the patent holder has demanded,	09:25:26
21		but as I said before, of course, if he thinks this is	09:25:30
22		too much, he has the option to go below the rate	09:25:34
23		demand by the patent holder and let this rate be	09:25:41
24		reviewed, and, of course -- yeah, so.	09:25:44
25	Q	Do you know how long a proceeding -- a court	09:25:47

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1 proceeding under Section 315 to evaluate a patent 09:25:52

2 holder's royalty rate takes? 09:25:55

3 A This is pure speculation because I'm not -- I'm 09:25:56

4 not -- these have not taken place, as far as my 09:26:00

5 knowledge is concerned. I could only guess. 09:26:02

6 Q So have there been any reported German 09:26:04

7 decisions that you are aware of that hold that the rate 09:26:07

8 set by a patent holder under the alternative Orange Book 09:26:10

9 process is acceptable? 09:26:13

10 A As there are no reported 315 procedures, I'm 09:26:14

11 not aware of that -- 09:26:18

12 (Telephonic interruption.) 09:26:18

13 MR. LOVE: I'll -- I'll ask again just so we 09:26:27

14 have a clear question and answer. 09:26:29

15 Q As far as you are aware, there are no reported 09:26:30

16 German decisions showing this second alternative Orange 09:26:32

17 Book procedure? 09:26:36

18 A The rate setting, the second -- the rate 09:26:36

19 setting -- 09:26:38

20 Q Yes. 09:26:40

21 A -- lawsuit? No, the rate has not been 09:26:40

22 reported. 09:26:44

23 Q So we believe -- you believe that the standard 09:26:44

24 that a court would apply in that proceeding is 09:26:47

25 whether -- is -- is to set a royalty within the limits 09:26:50

1 of antitrust law; correct? 09:26:52

2 A Yes. 09:26:54

3 Q But we don't know for sure because there are no 09:26:55  
4 decisions? 09:26:58

5 MS. BERRY: Objection; form. 09:26:59

6 THE WITNESS: Purely speculating. I wouldn't 09:27:01  
7 see any other standards which might be reasonable. I 09:27:05  
8 wouldn't see any of those standards could come into 09:27:07  
9 play, so it's not a -- yeah, I do not only believe it, 09:27:11  
10 there are strong arguments for that. 09:27:14

11 BY MR. LOVE: 09:27:15

12 Q Suppose that a patent holder rejected an Orange 09:27:16  
13 Book offer that a license seeker had made and that 09:27:20  
14 later -- 09:27:24

15 A Who was? 09:27:25

16 Q Sure. Let me start again. 09:27:26

17 So we are talking about the first Orange Book, 09:27:27  
18 not the alternative procedure, but the straightforward 09:27:31  
19 Orange Book offer. 09:27:33

20 A Yes. 09:27:34

21 Q So suppose a patent holder rejects an Orange 09:27:34  
22 Book offer and then a German court finds that the 09:27:38  
23 royalty offer was so high that that rejection was an 09:27:41  
24 abuse of antitrust law. 09:27:43

25 A Yes. 09:27:43

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1	A	Yes.	09:28:55
2	Q	What -- is -- let me ask it a different way.	09:28:55
3		Is there a reported decision of a German court	09:28:59
4		that states that?	09:29:01
5	A	No.	09:29:02
6	Q	Has the European Commission made that claim?	09:29:02
7	A	No.	09:29:06
8	Q	Has the European Court of Justice made that	09:29:06
9		claim?	09:29:09
10	A	No.	09:29:10
11	Q	Did you rely on Judge Robart's April 19th, 2013	09:29:10
12		findings of fact and conclusions of law --	09:29:21
13	A	No.	09:29:22
14	Q	I'll just finish -- let me just finish the	09:29:22
15		question.	09:29:26
16	A	Sorry.	09:29:26
17	Q	Did you -- that's okay.	09:29:26
18		Did you rely on Judge Robart's April 19th	09:29:28
19		findings of fact and conclusions of law in forming your	09:29:31
20		opinions in this case?	09:29:32
21	A	No.	09:29:33
22	Q	Why not?	09:29:33
23	A	They haven't been produced to -- they haven't	09:29:36
24		been given to me. I'm a expert on German law, and	09:29:40
25		certainly not an expert on U.S. law, and it's not -- I	09:29:43



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1 don't see it as my -- my duty here to -- to second-guess 09:29:46

2 opinions of a American judge. 09:29:49

3 Q Did you know about the opinion? 09:29:52

4 A No. 09:29:54

5 Q Did you read about it in the news? 09:29:55

6 A I -- there are certain logs on which these 09:29:57

7 things are reported, yes. I'm aware, but I never went 09:30:05

8 into detail. I never -- I never even went into the 09:30:08

9 specific issues of that. 09:30:11

10 Q Are you aware that Judge Robart made specific 09:30:12

11 findings concerning a RAND royalty for Motorola's H.264 09:30:15

12 patent portfolio? 09:30:19

13 A I'm aware that these things were being 09:30:20

14 discussed, but I'm not aware -- not informed about any 09:30:23

15 of the details of this proceeding. 09:30:25

16 Q Did you ask Motorola's counsel to provide you a 09:30:27

17 copy of Judge Robart's findings and conclusions? 09:30:32

18 A No. 09:30:34

19 Q Do you believe that Judge Robart's findings and 09:30:34

20 conclusions are not relevant to your opinions in your 09:30:39

21 expert reports? 09:30:41

22 A I'm only commenting on German law. I'm an 09:30:42

23 expert on German law. My duty and my assignment was to 09:30:47

24 describe the Germany situation, the German Orange Book 09:30:53

25 procedure, and given these facts, I don't think these 09:30:58

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1 issues are relevant for my opinion, because it's purely 09:31:03  
2 German law. 09:31:07

3 Q Are you familiar with the term "holdup" in the 09:31:08  
4 context of standard essential patents? 09:31:11

5 A Yes. 09:31:14

6 Q Do you agree that demanding excessive royalties 09:31:14  
7 from implementers of a standard is holdup? 09:31:18

8 MS. BERRY: Objection; form. 09:31:21

9 THE WITNESS: No. 09:31:22

10 BY MR. LOVE: 09:31:22

11 Q Do you agree that demanding royalties that 09:31:24  
12 exceed the value of the patented technology is holdup? 09:31:26

13 A Maybe we have to come back to the definition of 09:31:31  
14 holdup. I don't know in which context you use the word 09:31:34  
15 "holdup" here. 09:31:40

16 Q Well, I -- I guess my questions are part of 09:31:40  
17 understanding what you believe the definition of holdup 09:31:42  
18 is, so my first question was, "Do you agree that 09:31:46  
19 demanding excessive royalties from implementers of a 09:31:49  
20 standard is holdup?" And I believe that you said "No." 09:31:51

21 My second question is: Do you agree that 09:31:54  
22 demanding royalties that exceed the value of patented 09:31:57  
23 technology is holdup? 09:31:59

24 A It's pure -- it's negotiating a contract. 09:32:00  
25 People offer and people make counter-offers and then 09:32:05

1 royalty, the Mannheim Court does not evaluate it as part 09:43:00  
2 of the infringement proceeding. 09:43:04

3 A This is very speculative because these -- these 09:43:05  
4 things have not -- such a case has not happened, but I 09:43:07  
5 assume that the same rules would apply; that because the 09:43:12  
6 test is -- if the objection offer of a license offer 09:43:18  
7 violates antitrust law and in order to determine whether 09:43:25  
8 or not there is a violation of antitrust law, you have 09:43:30  
9 to consider all relevant facts and specifics of the 09:43:33  
10 case, and all these specifics of the case together will 09:43:36  
11 bring the court to a evaluation whether or not an offer 09:43:41  
12 is -- an offer is in accordance with antitrust law. 09:43:48

13 Q So Microsoft did make an Orange Book offer in 09:43:55  
14 Mannheim; correct? 09:43:59

15 A That's what I understand. 09:44:00

16 Q Did the Mannheim Court find that Microsoft did 09:44:01  
17 not offer a reasonable rate? 09:44:04

18 A The Mannheim Court said that it was not a 09:44:05  
19 violation of antitrust law if Motorola did not accept 09:44:13  
20 this offer. 09:44:18

21 Q Did the Mannheim Court find that Microsoft did 09:44:19  
22 not offer a reasonable rate? 09:44:22

23 MS. BERRY: Objection; asked and answered. 09:44:24

24 THE WITNESS: Reasonable? If you take the word 09:44:26  
25 "reasonable" and say that -- and as I said before, 09:44:31

1 reasonable and antitrust are identical standards -- then 09:44:34  
2 the same standards apply, and then you can derive from 09:44:38  
3 the decision that the -- the offer of Microsoft was not 09:44:41  
4 such that it would be in accordance -- the rejection of 09:44:49  
5 the offer would be in accordance with antitrust law. 09:44:55

6 (Exhibit 1 was marked for identification by the 09:45:03  
7 Court Reporter.) 09:45:03

8 MR. LOVE: So I'm going to hand you what's been 09:45:04  
9 marked as Exhibit 1. Exhibit 1 bears the Bates stamp 09:45:05  
10 MOTM\_WASH1823\_0602118. 09:45:09

11 Q If you turn to the second page, you will see 09:45:15  
12 that this is a translation of the Mannheim Court's 09:45:17  
13 judgment on May 2nd, 2012? 09:45:21

14 A Mm-hmm. 09:45:24

15 Q Could you turn to page 43 of the English 09:45:24  
16 translation of the decision. Bears the Bates stamp 09:45:28  
17 ending in 161. 09:45:38

18 On page 43 the last sentence before Section C 09:45:38  
19 says, "The taking of evidence on the issue of whether 09:45:39  
20 the offer is reasonable (in any event) is thus not 09:45:40  
21 required." 09:45:44

22 Do you see that? 09:45:44

23 A Yes. 09:45:45

24 Q So the Mannheim Court did not evaluate whether 09:45:45  
25 Microsoft's offer was reasonable; correct? 09:45:48

18	Q Did the Mannheim Court evaluate whether	09:46:57
19	Microsoft's offer was RAND?	09:46:59

20	A It evaluated whether the rejection of	09:47:02
21	Microsoft's offer was a violation of antitrust law, and	09:47:06
22	it came to the conclusion that there are serious doubts	09:47:10
23	as to whether the -- the offer is -- is high enough	09:47:15
24	under all circumstances, so the rejection of this offer	09:47:19
25	was no violation of antitrust law, and, accordingly, you	09:47:25

1	might say it was not RAND.	09:47:29
2	Q So you believe the Mannheim Court says	09:47:32
3	Microsoft's offer was not RAND?	09:47:35
4	MS. BERRY: Objection; form, misstates	09:47:38
5	testimony.	09:47:40
6	THE WITNESS: It says by -- the Mannheim Court	09:47:40
7	said, Microsoft's offer is not such that the rejection	09:47:44
8	of this offer is a violation of antitrust law.	09:47:49
9	BY MR. LOVE:	09:47:54
10	Q And you believe that standard is the same as	09:47:54
11	RAND?	09:47:56
12	A I believe that RAND and accordance with	09:47:56
13	antitrust law is similar.	09:48:02
14	Q So the "R" in RAND stands for reasonable;	09:48:04
15	correct?	09:48:08
16	A Yes.	09:48:08
17	Q The Mannheim Court did not consider any	09:48:09
18	evidence as to whether Microsoft's offer was reasonable;	09:48:12
19	correct?	09:48:15
20	A It made a high-level evaluation of the issues.	09:48:15
21	Q But it did not take any evidence on whether	09:48:20
22	Microsoft's offer was reasonable; correct?	09:48:22
23	A That is correct, as it is not part of the this	09:48:24
24	infringement procedure.	09:48:29
25	Q Microsoft made an Orange Book offer 2 eurocents	09:48:30

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1 per unit, up to 10 million units per year, and 09:48:34

2 1 eurocent per unit for units beyond 10 million. 09:48:36

3 Is that your understanding? 09:48:39

4 A This is my understanding. 09:48:41

5 Q And Motorola rejected that offer; correct? 09:48:42

6 A This is how I read the facts. 09:48:45

7 Q And the Mannheim Court found that Motorola's 09:48:46

8 rejection was acceptable because it was not an obvious 09:48:49

9 antitrust violation; correct? 09:48:52

10 A Yes. 09:48:53

11 Q Did the Mannheim Court apply a version of the 09:48:53

12 Orange Book procedure that is more favorable to a patent 09:49:03

13 holder than the original Orange Book procedure? 09:49:07

14 MS. BERRY: Objection; form. 09:49:10

15 THE WITNESS: More favorable to the? 09:49:11

16 MR. LOVE: Patent holder. 09:49:16

17 THE WITNESS: I think you -- it's very 09:49:22

18 difficult to say "yes" or "no" to that because the -- in 09:49:24

19 the Orange Book decision, the general -- the general 09:49:27

20 guidelines were set up, and then it's the -- the duty of 09:49:30

21 the lower courts to further develop it, and it's -- the 09:49:35

22 Mannheim Court is fully in the range of what the German 09:49:39

23 Supreme Court has said, but, of course, what these -- 09:49:43

24 this general street, which has been shown by the German 09:49:48

25 Federal Supreme Court, has to be defined more clearly 09:49:54

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1 BY MR. LOVE:

09:58:21

2 Q The Mannheim Court thought Microsoft's offer  
3 was too low; correct?

09:58:24

09:58:26

4 A This is how I understand the decision, yes.

09:58:27

5 Q Would you agree that Microsoft would have  
6 needed to make a higher Orange Book offer to avoid an  
7 injunction under the Orange Book procedure?

09:58:30

09:58:33

09:58:36

8 A No. They could have easily taken the other  
9 road.

09:58:38

09:58:40

10 Q If they were going to use the first  
11 alternative, the first alternative Orange Book  
12 procedure, and made a new offer to avoid an injunction,  
13 the offer would have had to be higher than its initial  
14 offer; correct?

09:58:41

09:58:44

09:58:46

09:58:51

09:58:53

15 A Yes.

09:58:54

16 Q What number would Microsoft have needed to  
17 offer to avoid an injunction?

09:58:54

09:58:58

18 A I have no opinion on that because all very much  
19 depends on the specifics of the -- of the case, and I'm  
20 not aware of all these specifics, and as there is the  
21 risk, as it is difficult to assess that, this is why we  
22 have the other procedure, the 315 procedure, so I cannot  
23 comment on how much money would have been necessary to  
24 have a RAND rate. I can just say, if there's  
25 uncertainty as to this, then it's advisable to use the

09:59:00

09:59:04

09:59:07

09:59:12

09:59:15

09:59:19

09:59:22

09:59:26



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1 other road, the 315 road. 09:59:29

2 Q Did you ask anyone at Motorola what number 09:59:31

3 Microsoft would have needed to offer to avoid an 09:59:34

4 injunction? 09:59:36

5 A No. No. 09:59:37

6 Q Why not? 09:59:37

7 A Because this is calculation. This is -- it's 09:59:38

8 outside my expertise. This is economic and -- and 09:59:43

9 business, and so it's not -- I'm not able to comment on 09:59:46

10 this. 09:59:49

11 Q I understood the conclusion of your expert 09:59:49

12 report was that Microsoft could have avoided an 09:59:53

13 injunction in Germany by following the Orange Book 09:59:56

14 procedure; correct? 09:59:59

15 A That's correct. 09:59:59

16 Q But you don't know what Motorola would have 10:00:00

17 done if Microsoft had made a higher offer under the 10:00:01

18 first Orange Book procedure? 10:00:04

19 A It's pure speculation, but if it's high enough, 10:00:05

20 then I assume it would have been accepted. If they 10:00:08

21 don't agree, the two parties, then it's advisable to go 10:00:13

22 the other way, to use the other road. 10:00:16

23 Q Would Microsoft have been able to avoid an 10:00:18

24 injunction in Mannheim by offering to accept a license 10:00:21

25 at the RAND rate set by Judge Robart of less than half a 10:00:25

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1	eurocent?	10:00:29
2	MS. BERRY: Objection; form.	10:00:29
3	THE WITNESS: I'm not -- I'm not -- I have no	10:00:30
4	opinion on that as I don't know the details.	10:00:33
5	BY MR. LOVE:	10:00:35
6	Q Microsoft's Orange Book offer that was rejected	10:00:36
7	was 2 eurocents, so if Microsoft had offered half a	10:00:38
8	eurocent, would it have been able to avoid an	10:00:43
9	injunction?	10:00:45
10	A If it's less than what has been given here,	10:00:45
11	it's rather unlikely.	10:00:49
12	Q Rather unlikely, or no?	10:00:50
13	A If it's lower than what has been -- well, the	10:00:52
14	court said -- the Mannheim Court said what has been	10:00:56
15	offered is so low that the rejection is not -- is not a	10:00:59
16	breach of antitrust law as it is conceivable that the	10:01:06
17	rate has to be higher.	10:01:12
18	So if the rate would have been lower, it is --	10:01:15
19	I cannot second-guess what the court would have said,	10:01:20
20	but it's -- it's pure logic that if it's lower, I assume	10:01:23
21	that also the same standard would have been applied, and	10:01:25
22	the same standard would have taught that the rejection	10:01:28
23	of such an offer is a violation of European antitrust	10:01:32
24	law.	10:01:36
25	Q If Microsoft had escrowed a sufficient amount	10:01:36

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1 be license fee, the license product, a rendering of 10:22:53  
2 account, if the -- the -- the patent as been made use of 10:22:57  
3 before, so these are the elements which have been -- 10:23:04  
4 have been decided about by the court. If further issues 10:23:08  
5 have to be included in such a License Agreement or not 10:23:12  
6 is pure speculation, I have no opinion on that. 10:23:18

7 Q Okay. Let's go back to what happened in 10:23:20  
8 Mannheim. 10:23:34

9 If Microsoft had followed the second 10:23:34  
10 alternative of the Orange Book procedure, Motorola would 10:23:34  
11 have set a higher royalty than the 1 to 2 eurocents that 10:23:35  
12 Microsoft had offered; correct? 10:23:38

13 MS. BERRY: Objection; form. 10:23:41

14 THE WITNESS: I have no opinion on that. 10:23:41

15 BY MR. LOVE: 10:23:43

16 Q Why would Motorola have set a lower royalty? 10:23:43

17 A I am not aware of -- the business evaluations, 10:23:45  
18 which are behind such an offer, are not -- have not come 10:23:50  
19 to my attention. I -- I can only speculate, but, of 10:23:54  
20 course, we can assume that. 10:23:58

21 Q If Microsoft had challenged the rate set by 10:24:00  
22 Motorola by bringing a separate proceeding later and the 10:24:03  
23 court set the royalty, the royalty set by the court 10:24:07  
24 would also be higher than a -- than the 1 to 2 eurocents 10:24:10  
25 that Microsoft had offered; correct? 10:24:15

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1 MS. BERRY: Objection; form. 10:24:16

2 THE WITNESS: This is -- this is speculation 10:24:17  
3 because you apply a different standard of -- there of 10:24:21  
4 assessing the -- the license fee, and as you hear 10:24:26  
5 evidence and as further circumstances will be looked 10:24:32  
6 upon and be considered by the court, it -- it's just a 10:24:38  
7 different way of assessing. It can be that it's higher. 10:24:43  
8 It can even be -- if the evidence is such that points in 10:24:46  
9 this direction might even be lower. It's just a new 10:24:53  
10 story then, and it will be assessed independently, and 10:24:56  
11 the court will -- will find what is the adequate and -- 10:24:59  
12 and FRAND and entered as conformed license fee. It can 10:25:04  
13 be higher. It could even be lower. It can be the same. 10:25:07  
14 I -- I cannot say. This is speculation. But, again, 10:25:11  
15 the -- the standards, which are used to determine the 10:25:15  
16 license fee, they are the relevant thing, and they take 10:25:17  
17 into account the standards. This might lead to one -- 10:25:22  
18 to one result or to the other. 10:25:25

19 BY MR. LOVE: 10:25:27

20 Q When we talked earlier about the second 10:25:31  
21 alternative, I thought I understood your position to be 10:25:34  
22 that the same standard would be used to evaluate and 10:25:38  
23 determine a correct license fee. It's a license fee 10:25:43  
24 that is not objectionable -- 10:25:46

25 A Yes. 10:25:46

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1 Q -- under antitrust laws. 10:25:47

2 A Yes. 10:25:49

3 Q So if the court is setting a royalty, it's 10:25:49  
4 going to set a royalty that is not objectionable under 10:25:52  
5 antitrust law; correct? 10:25:56

6 A Yes. 10:25:57

7 Q The Mannheim Court said that Motorola's 10:25:57  
8 rejection of the 1-to-2-eurocent offer was not 10:26:04  
9 objectionable under antitrust law; right? 10:26:08

10 A Can you repeat, please. 10:26:12

11 Q Sure. 10:26:13

12 Microsoft offered 1 to 2 eurocents. Motorola 10:26:14  
13 rejected it, and the Mannheim Court said that rejection 10:26:19  
14 did not violate antitrust law. 10:26:23

15 A Yes, that's correct. 10:26:24

16 Q But you said just now that in a later 10:26:25  
17 proceeding, if a court is setting the rate, it might set 10:26:28  
18 a rate lower than what Microsoft offered. 10:26:32

19 A It's -- it's speculation, and it also is a 10:26:37  
20 question of the German law of civil procedure and 10:26:39  
21 evidence. You know, in the -- in the first proceeding 10:26:44  
22 the courts will also assess what has been written in the 10:26:46  
23 briefs without taking evidence, and so they will make 10:26:49  
24 their -- they will form their opinion on what has been 10:26:52  
25 written and submitted by the parties. 10:26:55

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1           In a second -- the second case of the rate           10:26:58  
2     setting procedure, all evidence, all economic           10:27:02  
3     specialists may or may not be presented to the court,   10:27:07  
4     and the court will just have a very different basis to   10:27:12  
5     found its -- its -- for founding its opinion -- for       10:27:16  
6     forming its opinion, and it's -- it is possible that       10:27:20  
7     it's higher. It is maybe, well, possible, but it's       10:27:25  
8     speculation, but as there is another -- different       10:27:28  
9     standard of how the facts are evaluated, it may even be   10:27:32  
10    lower, but, again, this is pure speculation.           10:27:35

11           The only thing I want to say, this is a           10:27:38  
12    completely new story where all facts are assessed newly,   10:27:41  
13    and then the court will -- will find it -- will have its   10:27:46  
14    decision -- will render its decision on the basis of the   10:27:50  
15    facts which it has evaluated according to the law of       10:27:55  
16    civil procedure in this second proceeding.           10:27:58

17           Q     So the court, in the second proceeding, would   10:28:01  
18    apply the same standard, but it might reach a different   10:28:04  
19    result because it considers more evidence; is that       10:28:07  
20    correct?           10:28:11

21           A     It's just a different standard of review, a   10:28:11  
22    different standard of review of the first -- the review   10:28:13  
23    you have in your first -- in the first -- in the first     10:28:16  
24    road, that it's the -- the question whether or not it is   10:28:21  
25    obvious. So the idea is you have a -- you look into the   10:28:26

1       briefs, you evaluate what the parties have said, and you 10:28:30  
2       form your opinion by not going into -- especially by not 10:28:33  
3       taking evidence, so this is maybe specific to German 10:28:39  
4       law. 10:28:42

5               In the second proceeding, the proceeding will 10:28:42  
6       be a full-fledged proceeding, and the full-fledged 10:28:45  
7       proceeding will be more facts; more evidence will be 10:28:49  
8       assessed. For example, if you take a preliminary 10:28:51  
9       injunction, you also have a different standard of -- of 10:28:54  
10      evidence, which is lower than in -- in a full 10:28:59  
11      proceeding. And so it's just a different way of 10:29:04  
12      assessing facts and -- and hearing evidence or not 10:29:06  
13      hearing evidence. 10:29:12

14           Q     So I want to make sure I understand your 10:29:13  
15      position on what would have happened under the Orange 10:29:19  
16      Book. So this will be sort of a long question. I'll 10:29:21  
17      ask you a couple things, and just stop me if anything 10:29:24  
18      doesn't make sense. 10:29:27

19               Under the Orange Book procedure, as I 10:29:27  
20      understand it, there are three paths for Microsoft to 10:29:29  
21      avoid an injunction by agreeing to pay a royalty. 10:29:32

22               First, Microsoft could have made an Orange Book 10:29:36  
23      offer that Motorola accepted; correct? 10:29:38

24               Second, Microsoft could have let Motorola set a 10:29:42  
25      royalty; correct? 10:29:44

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1 A Yes. 10:29:47

2 Q And last, Microsoft could have challenged the 10:29:47  
3 rate that was set by Motorola, in which case a court, in 10:29:51  
4 a separate proceeding, may set a different royalty; 10:29:53  
5 correct? 10:29:57

6 A Can you repeat the question? 10:29:57

7 Q Sure. 10:30:00

8 So the -- the third path -- 10:30:01

9 A Yes. 10:30:01

10 Q -- would be Motorola sets a royalty. Microsoft 10:30:03  
11 challenges the royalty in a separate proceeding, and as 10:30:06  
12 part of that proceeding, the court finds that Motorola's 10:30:09  
13 royalty is -- is too high and sets a -- sets the royalty 10:30:12  
14 itself. 10:30:17

15 A That's correct. 10:30:18

16 MS. BERRY: Objection to form. 10:30:19

17 BY MR. LOVE: 10:30:20

18 Q For the first option, if Microsoft made an 10:30:21  
19 Orange Book offer, you don't know what Mo- -- what offer 10:30:22  
20 Motorola would have accepted; correct? 10:30:27

21 A Pure speculation. 10:30:28

22 Q For the second option, you don't know what 10:30:29  
23 royalty Motorola would have set, do you? 10:30:32

24 A Of course not, no. 10:30:35

25 Q And on the third option, you don't know what 10:30:37



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1 royalty a court would set? 10:30:40

2 A I can only say what the basis for a court 10:30:44  
3 decision would be. But as I don't know all the relevant 10:30:47  
4 facts and as I didn't hear all the evidence, which would 10:30:50  
5 come into play, of course I cannot give a -- give you a 10:30:52  
6 number, certainly not. 10:30:56

7 Q So in November of 2012, there was a trial, as 10:30:57  
8 part of this case, to determine a RAND royalty for 10:31:01  
9 Motorola's patents. 10:31:04

10 Are you aware of that? 10:31:06

11 A No. 10:31:06

12 MS. BERRY: Objection; form. 10:31:07

13 BY MR. LOVE: 10:31:07

14 Q So I'll represent to you that at that trial, 10:31:10  
15 there was expert testimony from technical experts and 10:31:15  
16 economic experts about the appropriate RAND royalty, but 10:31:18  
17 you haven't reviewed the transcript of that trial; 10:31:22  
18 correct? 10:31:25

19 A No, I haven't reviewed it. 10:31:25

20 Q So you don't know whether the evidence 10:31:26  
21 presented in the November 2000 trial -- 2012 trial in 10:31:29  
22 this case was in any way comparable to the evidence that 10:31:31  
23 would be considered by a German court that was setting a 10:31:35  
24 royalty? 10:31:39

25 A I have no opinion on that. 10:31:39

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1	THE WITNESS: Please repeat.	10:52:35
2	BY MR. LOVE:	10:52:38
3	Q If Microsoft's Orange Book offer was higher	10:52:38
4	than RAND, Motorola refused to enter a license on RAND	10:52:41
5	terms; correct?	10:52:45
6	MS. BERRY: Objection to form.	10:52:46
7	THE WITNESS: It's speculation. I don't know	10:52:47
8	if -- I cannot assess Microsoft's offer.	10:52:49
9	BY MR. LOVE:	10:52:50
10	Q For the purposes of this case, the RAND royalty	10:52:51
11	for all of the patents is less than half a eurocent.	10:52:54
12	Microsoft offered 2 eurocents for only two patents. So	10:52:59
13	Microsoft's offer was higher than RAND. Let's assume	10:53:03
14	that for my question.	10:53:06
15	If that's true, Motorola refused to enter a	10:53:06
16	license on RAND terms; correct?	10:53:10
17	MS. BERRY: Objection; form, incomplete	10:53:11
18	hypothetical.	10:53:13
19	THE WITNESS: It depends -- it's -- it depends	10:53:13
20	on all further -- on the further -- further circumstance	10:53:16
21	of the case. I don't know the specifics of the case.	10:53:19
22	I'm not able to -- to assess the business evaluations	10:53:22
23	behind this, so I can't just not comment on that.	10:53:27
24	BY MR. LOVE:	10:53:30
25	Q Why are business evaluations relevant to my	10:53:30

1 question?

10:53:32

2 A I don't know the background of the offer. I  
3 don't know the specific business interests of -- of  
4 Motorola and of Microsoft, the strategic ideas, how to  
5 make use of the technology. I just don't have enough  
6 background to answer this question.

10:53:34

10:53:36

10:53:39

10:53:42

10:53:46

7 Q Is it your position that a standard essential  
8 patent holder can refuse to enter a license on RAND  
9 terms because it has other business interests?

10:53:48

10:53:50

10:53:53

10 A No, but the -- in order to find what RAND is,  
11 you have to look into all specifics of the case,  
12 including the special interests of the parties in  
13 this -- in this case, and, of course, license fee is a  
14 very important issue, no -- no doubt about that, but  
15 there may be other surroundings. There may be other  
16 interests which may -- may alter the -- the assessment  
17 of interest.

10:53:55

10:54:03

10:54:07

10:54:11

10:54:14

10:54:17

10:54:19

10:54:23

18 Q Let's presume for the purposes of my question  
19 that everything you just mentioned was already addressed  
20 in this case in a trial in November 2012 that determined  
21 the RAND royalty.

10:54:24

10:54:27

10:54:29

10:54:33

22 Can you assume that that's correct? For the  
23 purposes of my next question, can you assume that all  
24 those business interests that you just mentioned were  
25 already tried in this case and that the judge has

10:54:34

10:54:38

10:54:40

10:54:44

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1 determined that, addressing all of those business 10:54:47  
2 interests, the RAND royalty is less than half a 10:54:49  
3 eurocent. 10:54:55

4 If that's true, then Motorola refused to enter 10:54:55  
5 a license on RAND terms; correct? 10:54:57

6 MS. BERRY: Objection; form, asked and 10:54:59  
7 answered, outside the scope of his expert report. 10:55:03

8 THE WITNESS: We -- I can only apply German 10:55:04  
9 law, and the findings of Justice Robart are -- are 10:55:09  
10 certainly not binding for the German court, and the 10:55:13  
11 German court will make -- will have to make its own 10:55:16  
12 evaluation, considering all the facts according to 10:55:19  
13 German law of civil procedure, and so it may be; it may 10:55:21  
14 not be, but I don't know what will come out, so it's 10:55:24  
15 just very speculative. I cannot give you a answer to 10:55:27  
16 that. I have no opinion. 10:55:30

17 BY MR. LOVE: 10:55:32

18 Q So a RAND royalty determined by a U.S. court 10:55:32  
19 and a RAND royalty in Germany are two different things; 10:55:35  
20 is that correct? 10:55:39

21 A Not necessarily, but it's -- the German patent 10:55:39  
22 procedure is completely independent and has its 10:55:45  
23 different law of civil procedure, and all facts will be 10:55:50  
24 assessed by the German courts, and, of course, German 10:55:52  
25 judges will look what the American judges have done, but 10:55:55

1 they are by no means bound by what has been done in 10:55:59  
2 the U.S. -- in the U.S., so it's completely different 10:56:04  
3 and completely independent from each other. 10:56:06

4 Q Is European antitrust law binding on German 10:56:08  
5 courts? 10:56:16

6 A Yes. 10:56:16

7 Q Are you aware that under European antitrust 10:56:19  
8 law, the European Commission has initiated proceedings 10:56:22  
9 against Motorola based on its assertion of standard 10:56:26  
10 essential patents against Apple? 10:56:30

11 A I'm not familiar with the details, but I 10:56:30  
12 have -- 10:56:36

13 Q And the European Commission has also initiated 10:56:36  
14 proceedings against Samsung for its assertions of 10:56:39  
15 standard essential patents? 10:56:43

16 A Sorry. I'm aware of the Samsung proceedings. 10:56:43  
17 I have -- 10:56:48

18 (Exhibit 2 was marked for identification by the 10:56:50  
19 Court Reporter.) 10:56:50

20 MR. LOVE: I'm handing you what's been marked 10:56:58  
21 as Exhibit 2. This is a European Commission press 10:56:59  
22 release that's dated December 21st, 2012. 10:57:09

23 Q Have you seen this document before? 10:57:14

24 A Yes. 10:57:15

25 MS. BERRY: Counsel, have you produced this 10:57:16

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1           A    No, because the Orange Book procedure gives   11:07:08  
2   a -- the Orange Book procedure makes sure and clarifies   11:07:22  
3   that only a person which is really willing to negotiate,   11:07:29  
4   which is sincere, is -- can -- can avoid an injunction.   11:07:35  
5   Only a mere willingness to negotiate is not -- is not   11:07:44  
6   sufficient.   11:07:49

7           Q    The European Commission's view in the document   11:07:51  
8   we just read is a patent holder cannot seek injunctive   11:07:54  
9   relief against a willing RAND licensee; correct?   11:07:58

10          A    Yes.   11:08:00

11          Q    Microsoft made an offer to Motorola; correct?   11:08:01

12          A    Yes.   11:08:07

13          Q    The Mannheim Court applied a version of the   11:08:07  
14   Orange Book procedure where Motorola could reject   11:08:12  
15   Microsoft's offer --   11:08:14

16          A    Yes.   11:08:15

17          Q    -- unless the rejection would be an obvious   11:08:16  
18   antitrust violation; correct?   11:08:19

19          A    Yes.   11:08:20

20          Q    Does that procedure satisfy European law as set   11:08:20  
21   out by the European Commission's preliminary view?   11:08:24

22               MS. BERRY: Objection; form.   11:08:27

23               THE WITNESS: The Commission's view that the   11:08:28  
24   acceptance of binding third-party determination for the   11:08:40  
25   terms of a FRAND license in the event that bilateral   11:08:43

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1 negotiations would come to -- to conclusion is a clear 11:08:46  
2 indication -- I don't see that the -- that Microsoft has 11:08:47  
3 surrendered to a binding third-party determination 11:09:03  
4 because it didn't use a second road. It didn't use the 11:09:06  
5 315 road. 11:09:10

6 BY MR. LOVE: 11:09:11

7 Q Were you aware that, at least as of September 11:09:11  
8 2011, Microsoft declared that it was willing to enter 11:09:15  
9 into a license on RAND terms for Motorola's H.264 11:09:17  
10 patents? 11:09:20

11 A I'm familiar with the basics of the -- of this 11:09:21  
12 lawsuit. 11:09:26

13 Q So you understand that Microsoft told the court 11:09:26  
14 and Motorola that Microsoft was seeking and was ready 11:09:31  
15 and willing to take a license to Motorola's H.264 11:09:34  
16 patents on RAND terms? 11:09:37

17 A Yes. 11:09:38

18 Q And you understand that, in this case, 11:09:38  
19 Microsoft seeks a judicial determination of a royalty 11:09:40  
20 rate for Motorola's H.264 patents? 11:09:44

21 MS. BERRY: Objection; form. 11:09:47

22 THE WITNESS: I don't see there is Microsoft 11:09:47  
23 seeks a judicial determination, but Microsoft proposed a 11:09:53  
24 certain license fee which was declined by Motorola, and 11:09:57  
25 then the court made a review, and Microsoft just did not 11:10:02

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1 seek a final evaluation of the license fee which would 11:10:07  
2 have only happened under the 315 procedure. 11:10:13

3 (Exhibit 5 was marked for identification by the 11:10:18  
4 Court Reporter.) 11:10:18

5 MR. LOVE: Let's take a look at another 11:10:19  
6 exhibit. I've marked, as Exhibit 5, Microsoft's 11:10:21  
7 complaint in this case. 11:10:23

8 Q Could you turn to paragraph 9, which you will 11:10:30  
9 find at the bottom of page 4. Paragraph 9 begins 11:10:32  
10 "Accordingly, Microsoft seeks," and I'm going to skip 11:10:42  
11 letter i there, and I'm going to go to the ii, Roman ii, 11:10:43  
12 "a judicial declaration" -- I apologize. I intend to go 11:10:46  
13 to Roman iii, "a judicial accounting of what constitutes 11:10:52  
14 a royalty rate in all respects" -- let me turn the 11:10:54  
15 page -- "consistent with Motorola's promises for WLAN 11:10:58  
16 patents identified as 'essential' by Motorola and for 11:11:01  
17 H.264 patents identified by Motorola." 11:11:03

18 Do you see that? 11:11:07

19 A Yes. 11:11:08

20 Q So Microsoft asked Judge Robart in this case to 11:11:08  
21 determine a RAND royalty for Motorola's H.264 patents, 11:11:12  
22 and the trial in November 2012, I will represent to you, 11:11:15  
23 determined such a royalty rate. 11:11:20

24 So Motorola's -- sorry. Microsoft's 11:11:23  
25 complaint -- as you can see from the date at the top, 11:11:26



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1 this was filed in November of 2010. By September 2011, 11:11:27  
2 Motorola knew Microsoft was willing to enter into a 11:11:32  
3 license on RAND terms that would be determined by the 11:11:34  
4 U.S. court; correct? 11:11:37

5 A Yeah. 11:11:38

6 MS. BERRY: Objection; form, outside the scope 11:11:39  
7 of his expert report. 11:11:40

8 BY MR. LOVE: 11:11:41

9 Q Motorola continued to pursue an injunction in 11:11:42  
10 Germany after September 2011; correct? 11:11:44

11 A Yes. 11:11:46

12 Q So Motorola was abusing its dominant position 11:11:47  
13 by pursuing an injunction against Microsoft; correct? 11:11:51

14 MS. BERRY: Objection; form. 11:11:53

15 THE WITNESS: Yes. A preliminary? Please 11:11:54  
16 repeat. 11:12:00

17 BY MR. LOVE: 11:12:00

18 Q Motorola was abusing its dominant position by 11:12:02  
19 pursuing an injunction against Microsoft; correct? 11:12:05

20 A Say it again. Motorola? 11:12:08

21 Q Motorola was abusing its dominant position, in 11:12:12  
22 the meaning of European antitrust law, by pursuing an 11:12:16  
23 injunction against Microsoft; correct? 11:12:18

24 MS. BERRY: Objection; form. 11:12:20

25 THE WITNESS: I don't agree. I read -- I'm not 11:12:20

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1       sure if I read the commission statement in such a way       11:12:29  
2       that a assessment of authority outside of the European       11:12:34  
3       Union would -- would suffice. I would rather think that       11:12:42  
4       an assessment only by a administrative agency or a court       11:12:48  
5       within the European Union, which is also subject to EU       11:12:55  
6       law, would suffice in order to -- to meet the       11:12:59  
7       requirements of -- of this -- of this commission       11:13:02  
8       statement as -- or the -- as the supremacy of European       11:13:07  
9       law, and I would not -- I would doubt that authorities,       11:13:13  
10      no matter how respect -- how well respected they are,       11:13:17  
11      which are beyond the reach of European Union law,       11:13:21  
12      could -- could meet the preconditions which have been       11:13:25  
13      set up.       11:13:29

14      BY MR. LOVE:       11:13:29

15           Q     Do you think the court in Seattle is not       11:13:30  
16      capable of determining a RAND royalty?       11:13:33

17           A     I just said, with all due respect to the court,       11:13:34  
18      it's not bound by the European Union law, and I -- I'm       11:13:37  
19      not sure. I would -- I would have to go further into       11:13:41  
20      details, of course. I'm not sure whether an authority       11:13:46  
21      outside the use scope -- outside the reach of European       11:13:49  
22      Union law would be found to be sufficient under this       11:13:54  
23      declaration. But, again, this is speculation. I see       11:13:59  
24      this paper the first time. I'm not able to -- to       11:14:02  
25      comment in depth.       11:14:05

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1 in there. 11:44:48

2 Q Did you review any communications between 11:44:49

3 Microsoft and Motorola concerning whether Motorola would 11:44:50

4 agree not to enforce the German injunction? 11:44:54

5 A No. 11:45:02

6 Q Were you aware that Microsoft asked Motorola to 11:45:03

7 agree not to enforce the German injunction and allow the 11:45:06

8 proceedings in this case here in Seattle to go forward? 11:45:09

9 MS. BERRY: Objection; form. 11:45:14

10 THE WITNESS: I have very general knowledge of 11:45:15

11 that. 11:45:17

12 BY MR. LOVE: 11:45:17

13 Q And Motorola refused; correct? 11:45:17

14 A I have very general knowledge of that too. 11:45:19

15 That's -- 11:45:25

16 Q Your understanding is that Motorola would not 11:45:25

17 agree to -- to stay enforcement of the German 11:45:28

18 injunction? 11:45:31

19 MS. BERRY: Objection; form. 11:45:32

20 THE WITNESS: This has not been produced to me. 11:45:37

21 I just know the public available sources, which I read, 11:45:39

22 but I have no further detailed knowledge of all these -- 11:45:41

23 these proceedings. 11:45:44

24 BY MR. LOVE: 11:45:44

25 Q Did you ask Motorola's counsel or anyone at 11:45:44

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1 Motorola whether Motorola planned to enforce the 11:45:46  
2 Mannheim judgment against Microsoft? 11:45:48

3 MS. BERRY: Objection; calls for 11:45:50  
4 attorney-client-privileged information. I instruct the 11:45:51  
5 witness not to an answer. 11:45:54

6 BY MR. LOVE: 11:46:03

7 Q Your report suggests that Microsoft could avoid 11:46:04  
8 an injunction because Motorola might not enforce the 11:46:07  
9 judgment; correct? 11:46:11

10 A Say it again. 11:46:11

11 Q Your report suggests that Microsoft might have 11:46:14  
12 avoided an injunction because Motorola would not enforce 11:46:18  
13 it; correct? 11:46:21

14 A It is possible it would be -- of course, what I 11:46:22  
15 said is that it's not automatically -- the junction is 11:46:28  
16 not automatically enforced but that there have to be 11:46:33  
17 further steps being taken. 11:46:36

18 Q Did you ask anyone at Motorola if Motorola 11:46:38  
19 planned to take those steps? 11:46:40

20 MS. BERRY: Objection; calls for 11:46:41  
21 attorney-client communications. Instruct the witness 11:46:43  
22 not to answer. 11:46:46

23 BY MR. LOVE: 11:46:47

24 Q Are you going to follow your counsel's advice? 11:46:47

25 A Yes. 11:46:49

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1 Q If Judge Robart had denied Microsoft's motion 11:46:49  
2 for a preliminary injunction here in Seattle, would 11:46:57  
3 Motorola have enforced its German injunction? 11:47:00

4 A I don't know. 11:47:02

5 MS. BERRY: Objection; form. 11:47:03

6 THE WITNESS: That's pure -- I no information 11:47:06  
7 about that. 11:47:10

8 BY MR. LOVE: 11:47:10

9 Q Did you ask anyone at Motorola? 11:47:11

10 MS. BERRY: Same objections as before. 11:47:12

11 Instruct the witness not to answer. 11:47:13

12 BY MR. LOVE: 11:47:15

13 Q Will you follow your counsel's advice? 11:47:15

14 A Yes. 11:47:16

15 Q If the Ninth Circuit had reversed 11:47:17

16 Judge Robart's preliminary injunction, would Motorola 11:47:20  
17 have enforced the injunction in Mannheim? 11:47:22

18 MS. BERRY: Objection; form, calls for 11:47:24  
19 speculation, outside the scope of his expert report. 11:47:26

20 BY MR. LOVE: 11:47:28

21 Q Did you ask anyone at Motorola, if the 11:47:29  
22 Ninth Circuit had reversed, did they plan to enforce the 11:47:31  
23 injunction? 11:47:34

24 MS. BERRY: Objection; calls for 11:47:35  
25 attorney-client communications. Instruct the witness 11:47:36

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1	not to answer.	11:47:38
2	BY MR. LOVE:	11:47:39
3	Q Will you follow your counsel's advice?	11:47:40
4	A Yes.	11:47:41
5	Q The European Commission's preliminary view is	11:47:41
6	that enforcing injunctions on standard essential patents	11:47:46
7	against a willing licensee is an abuse of antitrust law;	11:47:49
8	is that correct?	11:47:54
9	MS. BERRY: Objection; form.	11:47:54
10	THE WITNESS: Please repeat.	11:47:54
11	MR. LOVE: Sure.	11:47:56
12	Q The European Commission's preliminary view is	11:47:56
13	that enforcing injunctions on standard essential patents	11:48:00
14	against a willing licensee is an abuse of antitrust law;	11:48:02
15	correct?	11:48:06
16	A These are the wordings used, yes.	11:48:06
17	Q Would you agree that Judge Robart in the	11:48:08
18	Ninth Circuit helped Motorola avoid exposing itself to	11:48:11
19	additional antitrust liability?	11:48:16
20	MS. BERRY: Objection to form, outside the	11:48:17
21	scope of his expert report.	11:48:19
22	THE WITNESS: I have no sufficient information.	11:48:20
23	I have no opinion as it relates to the U.S. trial.	11:48:22
24	BY MR. LOVE:	11:48:24
25	Q Do you understand that the decision to relocate	11:48:25

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1 Microsoft's distribution center in Germany required 11:48:28

2 considerable preparation beginning in January of 2012? 11:48:32

3 MS. BERRY: Objection; form, outside the scope 11:48:36

4 of his expert report. 11:48:37

5 THE WITNESS: I have no opinion on that. 11:48:39

6 BY MR. LOVE: 11:48:40

7 Q Are you aware of any of the details surrounding 11:48:40

8 Microsoft's decision to relocate its German facility? 11:48:42

9 A No. 11:48:46

10 Q Did you review any documents associated with 11:48:46

11 the move? 11:48:48

12 A No. 11:48:49

13 Q Did you review the deposition transcripts of 11:48:49

14 the Microsoft employees who described that process? 11:48:51

15 A No. 11:48:54

16 Q Were you aware that Microsoft made its decision 11:48:54

17 and had begun implementing the relocation out of Germany 11:48:59

18 in March of 2012? 11:49:03

19 A No. 11:49:04

20 Q If Motorola had enforced the injunction in 11:49:05

21 Mannheim, could Microsoft have continued to distribute 11:49:10

22 H.264-compliant products in Germany? 11:49:14

23 A If they fall under the patent and if there has 11:49:17

24 been an injunction, no. 11:49:22

25 Q If Motorola had enforced its injunction in 11:49:23





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1 Q So in discussing patent infringement lawsuits, 11:51:45  
2 those articles touch on the aspects of the German Code 11:51:48  
3 of Civil Procedure? 11:51:52

4 A Right. 11:51:52

5 Q Okay. Exhibit D to your rebuttal report shows 11:51:52  
6 screen shots from software that's called 11:51:57  
7 ProzessKostenRechner; is that correct? 11:52:01

8 A Yes. 11:52:02

9 Q Was I close on the pronunciation? 11:52:02

10 A Very good. 11:52:05

11 Q This is software that is used to calculate 11:52:05  
12 statutory attorney fees in Germany; is that correct? 11:52:08

13 A Yes. 11:52:10

14 Q Have you used the software before? 11:52:10

15 A Yes. 11:52:12

16 Q So before your work -- prior to the work in 11:52:13  
17 your case, you have used the software? 11:52:15

18 A I tried it once. I never -- 11:52:16

19 Q When did you try it? 11:52:22

20 A Couple of -- before when I was assessing 11:52:23  
21 attorneys' fees in another case. 11:52:28

22 Q Were you serving as an expert witness when you 11:52:30  
23 did that? 11:52:34

24 A No. No, no. 11:52:34

25 Q Were you a practicing attorney at that time? 11:52:34

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1 A No. 11:52:36

2 Q So could you help me understand why you were 11:52:37  
3 using the software previously? 11:52:41

4 A Because, privately, I helped people who wanted 11:52:43  
5 to have an attorney, and I was given the information 11:52:46  
6 about the costs which they would run into. 11:52:48

7 Q But other than that one instance, had you ever 11:52:51  
8 used the software prior to your work in this case? 11:52:54

9 A No. 11:52:56

10 Q Is it your opinion that the attorneys' fees 11:52:56  
11 Germany -- sorry. Start again. 11:53:02

12 Is it your opinion that the attorneys' fees in 11:53:04  
13 Germany that Microsoft is seeking to recover are far in 11:53:07  
14 excess of what could be recovered under Germany's 11:53:09  
15 statutory fee scheme? 11:53:12

16 A Yes. 11:53:13

17 Q And that's because the statute provides a cap 11:53:14  
18 on how much can be recovered; correct? 11:53:19

19 A Yes. 11:53:21

20 Q So even if a party wins -- 11:53:21

21 A Maybe not a cap. I have to correct. Not a 11:53:23  
22 cap, but a special -- there's a special procedure how 11:53:26  
23 the costs are assessed as to cap, but the costs are 11:53:27  
24 calculated. 11:53:31

25 Q And the process for calculating the costs in 11:53:32

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1 many cases may be lower than the actual fees that a 11:53:35  
2 party paid; correct? 11:53:38

3 A It always depends. Cannot give a general 11:53:39  
4 answer to that. 11:53:45

5 Q So even if a party prevails, the prevailing 11:53:46  
6 party will not necessarily recover all the fees it paid; 11:53:49  
7 correct? 11:53:52

8 MS. BERRY: Objection; form. 11:53:52

9 THE WITNESS: It's very much dependent on the 11:53:53  
10 specifics of the case. 11:53:56

11 BY MR. LOVE: 11:53:57

12 Q So the total that Microsoft seeks for fees paid 11:53:58  
13 to the Fresh Fields firm is about 2.119 million. 11:54:01

14 Does that sound correct? 11:54:05

15 A Yes. 11:54:07

16 Q Is that amount typical for a patent case like 11:54:07  
17 the Mannheim actions? 11:54:10

18 MS. BERRY: Objection; form, outside the scope 11:54:11  
19 of his expert report. 11:54:13

20 THE WITNESS: As I'm not an attorney -- can you 11:54:14  
21 ask the question again. 11:54:18

22 MR. LOVE: Sure. 11:54:19

23 Q Is -- is that amount -- the 2.119 million, is 11:54:19  
24 that amount typical for a patent case like the Mannheim 11:54:22  
25 actions? 11:54:26

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1           A    I can't say because all cases are different, 11:54:27  
2           and it -- the costs may be very different. I cannot 11:54:30  
3           give you a clear -- I cannot say a statistical -- if 11:54:33  
4           it's typical or not. It just depends on the cases. 11:54:37

5           Q    For -- for what you know about this case, did 11:54:39  
6           that amount strike you as unusual? 11:54:42

7                   MS. BERRY: Objection to form. 11:54:44

8                   THE WITNESS: I have no opinion on this because 11:54:45  
9           I don't work as an attorney, so I don't see the bills 11:54:49  
10          all the time. 11:54:51

11          BY MR. LOVE: 11:54:52

12          Q    Well, your report says this amount was far in 11:54:52  
13          excess of what could be recovered under the scheme. 11:54:54

14          A    Yes. 11:54:57

15          Q    And I'm asking whether you think that's typical 11:54:57  
16          or not? 11:55:00

17                   MS. BERRY: Objection; form. 11:55:00

18                   THE WITNESS: I answered the question, that 11:55:01  
19          it's the -- the scheme sets up a certain rate, and it -- 11:55:06  
20          I don't know what -- what exactly law firms charge when 11:55:11  
21          they go -- when they charge on hourly basis, so I cannot 11:55:17  
22          give you any further information on that. 11:55:23

23          BY MR. LOVE: 11:55:24

24          Q    So you're offering expert testimony on the 11:55:24  
25          recovery of fees and costs -- 11:55:28

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1	A	Yes.	11:55:28
2	Q	-- in this case; correct?	11:55:29
3	A	Yes.	11:55:30
4	Q	But you don't know what typical fees are	11:55:31
5		actually charged in cases like this?	11:55:33
6	A	There are no typical fees for typical cases. I	11:55:35
7		can only say what the statutory rates are, and then when	11:55:38
8		it's about hourly rates -- hourly rates, these -- this	11:55:42
9		is very different frequently.	11:55:46
10	Q	So when you say that Microsoft's fees are far	11:55:47
11		in excess of what could be recovered, you don't know if	11:55:50
12		that's unusual or not, do you?	11:55:52
13		MS. BERRY: Objection to form; asked and	11:55:55
14		answered.	11:55:56
15		THE WITNESS: I answered already that I know	11:55:56
16		the statutory fee, and I know that this is beyond	11:56:00
17		this --	11:56:04
18		BY MR. LOVE:	11:56:04
19	Q	Well, why did you say "far in excess"?	11:56:04
20	A	Because the statutory fee is lower.	11:56:06
21	Q	So you could have said that the fee is in	11:56:09
22		excess of the statutory fee; right?	11:56:11
23	A	Yes.	11:56:13
24	Q	What is your basis for saying that it is far in	11:56:14
25		excess?	11:56:17

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1	A	Because it's much more.	11:56:17
2	Q	But you don't know if that's unusual or not?	11:56:19
3		MS. BERRY: Objection to form; asked and	11:56:22
4		answered.	11:56:23
5		THE WITNESS: I answered the question already.	11:56:23
6		BY MR. LOVE:	11:56:25
7	Q	Do you know how much Motorola spent on the	11:56:25
8		Mannheim cases?	11:56:27
9	A	No.	11:56:28
10	Q	Did you ask?	11:56:28
11	A	No.	11:56:29
12	Q	Do you think it would be unusual to spend twice	11:56:30
13		as much as Microsoft did?	11:56:33
14		MS. BERRY: Objection; form, asked and	11:56:34
15		answered.	11:56:37
16		THE WITNESS: It's pure -- pure speculation.	11:56:37
17		BY MR. LOVE:	11:56:39
18	Q	Would you be surprised to know that Motorola	11:56:39
19		paid more than twice as much as Microsoft?	11:56:41
20		MS. BERRY: Objection; form.	11:56:43
21		THE WITNESS: It's very speculative.	11:56:47
22		BY MR. LOVE:	11:56:50
23	Q	If I told you that Motorola spent more than	11:56:50
24		twice as much on attorneys' fees in the Mannheim cases,	11:56:52
25		would you find that surprising?	11:56:55

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1 MS. BERRY: Objection; form, outside the scope 11:56:56  
2 of his expert report. 11:56:59

3 THE WITNESS: I have no opinion on that. 11:57:01

4 BY MR. LOVE: 11:57:02

5 Q In your expert report, you go through a 11:57:04  
6 calculation which determines the statutory fee that 11:57:07  
7 Microsoft could recover if it prevailed in Mannheim; 11:57:10  
8 correct? 11:57:13

9 A That's correct. 11:57:13

10 Q Would that calc- -- and that calculation is 11:57:13  
11 based on the value of the cases; is that correct? 11:57:15

12 A That's correct. 11:57:18

13 Q So assuming that Motorola prevails under the 11:57:18  
14 German scheme, Motorola can recover fees from Microsoft; 11:57:22  
15 correct? 11:57:25

16 A Yes. 11:57:25

17 Q Would it be the same amount that you calculated 11:57:25  
18 in your expert report? 11:57:28

19 A Yes. 11:57:29

20 Q So it would be the same for either party? 11:57:32

21 A Yes. 11:57:34

22 Q Do you have an understanding of why the German 11:57:34  
23 law concerning the recovery of attorneys' fees is 11:57:46  
24 relevant to the upcoming trial in this case? 11:57:48

25 MS. BERRY: Objection; form. 11:57:50

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1	THE WITNESS: On a very, very general.	11:57:51
2	BY MR. LOVE:	11:57:58
3	Q What is that understanding?	11:57:58
4	A That it is under discussion in this case,	11:57:59
5	that --	11:58:04
6	Q Did anyone explain to you why it's under	11:58:04
7	discussion?	11:58:06
8	MS. BERRY: Objection to form, calls for	11:58:07
9	attorney-client communications. I instruct the witness	11:58:08
10	not to answer to the extent your answer would involve	11:58:16
11	the communications with your attorneys.	11:58:18
12	THE WITNESS: Then I'm not going to answer.	11:58:20
13	BY MR. LOVE:	11:58:21
14	Q If Motorola is correct that it's two German	11:58:24
15	patents are actually essential to the H.264 standard,	11:58:29
16	would you expect that they would prevail in any	11:58:32
17	infringement case against an implementer of the	11:58:35
18	standard?	11:58:37
19	A Always depends on the -- on the circumstances	11:58:41
20	of the case. If the person makes unauthorized use, then	11:58:44
21	it would prevail. Just depends on the facts, but --	11:58:50
22	Q Sure. Let's break that --	11:58:50
23	A -- reasoning is very straightforward when you	11:58:53
24	you prevail in the patent infringement lawsuit and when	11:58:55
25	you lose.	11:58:57